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No. 706

In the Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE WILLIAM BRUTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 16–27) is reported at 375 F. 2d 355.

JURISDICTION

The judgment of the court of appeals (App. 28) was entered on March 22, 1967. On May 11, 1967, petitioner applied for an extension of time within which to petition for a writ of certiorari. An extension until May 21, 1967, was granted by Mr. Justice White, without prejudice to consideration of the timeliness of the petition. The petition was filed on May 16, 1967, and the writ was granted on October 9, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner and a co-defendant, William Evans, were convicted in the United States District Court for the Eastern District of Missouri of assaulting an operator of a Post Office Contract Station with a dangerous weapon, in violation of 18 U.S.C. 2114. A sentence of twenty-five years, mandatory under Section 2114, was imposed on petitioner on July 1, 1966 (App. 9, 94).

1. The contract station involved was located in the Robinson Jewelry Company (App. 61–62). The testimony at trial showed that on April 16, 1965, two men, later identified as petitioner and defendant Evans (App. 63, 65), entered the store and were waited on by Miss Shirley Miller, an employee at the store (App. 62–63). After a brief discussion, Evans pulled a gun, pointed it at Paul Robinson who was in the rear portion of the store, and announced a hold-up (App. 64–65). As Evans proceeded to the rear of the store, petitioner, brandishing a revolver, told Miss Miller to remain in the front portion of the store (App. 65, 67–68). Subsequently, Miss Miller was ordered by petitioner to the rear portion of the store, where she observed Evans going through a large safe and Robinson lying face down on the floor. She was directed to lie face down near Robinson (App. 66–67). Both Miss Miller and Robinson were tied up. While being guarded by Evans, Miss Miller heard the breaking of glass and the opening of the cash register in

the front portion of the store (App. 67). Petitioner and Evans fled through the rear door, cautioning Miss Miller and Robinson to remain on the floor for five minutes (App. 68). After freeing themselves, Robinson telephoned the police.

Approximately one year later, Miss Miller identified petitioner in a police lineup (App. 70). She had been unable to identify him at an earlier lineup held in November or December of 1965. She explained at trial that she distinctly remembered that during the robbery petitioner's right eye drooped to one side, had a milky look, and was dotted with bloody spots—a condition which was not present during the earlier lineup, but which reappeared at the later. She also explained that, at the earlier lineup, petitioner had not worn a hat, as he had at the time of the robbery, and that as a consequence, his face appeared longer at the first lineup. Moreover, at the earlier lineup, petitioner's skin appeared lighter because he was wearing lighter colored clothing (App. 70–72). Robinson, who had caught only a glimpse of petitioner, could not identify him (App. 75).

2. After the government had presented the substance of its case, it called Postal Inspector J. B. Thorn who, without objection from petitioner, testified as to two oral admissions made by Evans.[1] Thorn

[1] Defendant Evans was arrested by local police on March 22, 1966, on a State charge in connection with the robbery of a Western Union office (App. 32, 41). After he had been identified in a lineup by Miss Miller and Robinson, Detective Oscar Farmer of the St. Louis Metropolitan Police Force questioned him about his involvement in the robbery of the contract station. On April 8,

what the evidence shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant. Each defendant is entitled to have his case determined from his own acts and statements and the other evidence in the case which may be applicable to him.

The jury returned verdicts of guilty against both defendants.

3. On appeal from both convictions, the court below held that the interrogation of Evans by the local detective on April 8, when he first admitted his involvement in the crime, did not comply with the standards prescribed in this Court's opinion in *Miranda* v. *Arizona*, 384 U.S. 436—standards applicable to this trial, which commenced on June 20, 1966. It further held the subsequent statements made to Inspector Thorn were tainted by the previous admission (App. 22–24). The court thus concluded that all of the statements were inadmissible and remanded Evans' case for a new trial. At the same time, the court affirmed petitioner's conviction, noting that petitioner had not moved for a severance, that there was substantial evidence of his guilt independent of Evans' admission, and that the trial court's limiting instructions had been clear and precise. Evans' retrial, at which his admissions were not introduced, resulted in his acquittal.

DISCUSSION

This case presents a question of difficulty which arises from pressing a generally sound principle further than we believe can be supported on the particular facts involved.

We believe that the court of appeals was correct in observing (App. 26) that "the admission into evidence of a co-defendant's statement, under proper cautionary and limiting instructions, will not necessarily require a reversal of the conviction of the other defendant." That conclusion is required by this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232, which rejected the contention that the admission in evidence of a co-defendant's post-conspiracy confession, without deletion of references to the petitioner, required reversal of the petitioner's conviction. To hold otherwise would mean that in any case involving multiple defendants it would be necessary to try the defendants jointly, without admitting the confession of any defendant, or to conduct a separate trial as to any defendant who has made a confession. We believe that in some cases at least joint trials may be had and one or more confessions received under proper instructions without an undue risk of prejudice.[4] Indeed, "[u]nless we proceed on

[4] There are obviously cases in which an attempt to try co-conspirators *seriatim* rather than jointly would entail not only an unreasonable duplication of effort but also intolerable delay in the administration of justice. This would be true, for example, where a substantial number of defendants have participated in a common course of action or where a group of co-conspirators are involved in complicated and fraudulent financial transactions. These are situations in which individual trials would create a formidable obstacle to the administration of the criminal law. See, *e.g.*, *United States* v. *Dardi*, 330 F. 2d 316 (C.A. 2), certiorari denied, 379 U.S. 845.

the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense." *Delli Paoli* v. *United States*, 352 U.S. at 242.

Starting from this premise, it is easy to construct a logically impeccable argument that the admitted confession, in the light of the instructions given the jury, has no bearing on the case of another defendant. Since it did not harm him when it was admitted, it makes no difference that it was wrongly admitted. In the light of the reasons for its admission, and the instructions given the jury, it is simply irrelevant as far as the other defendant is concerned.

This is the ground on which the court below based its decision; and it is the ground upon which the government's brief in opposition in this case was based.

After further consideration, however, the Solicitor General has now come to the conclusion that in the circumstances of this case the *Delli Paoli* rule should not be extended that far. It is one thing to say, as *Delli Paoli* does, that a confession may be admitted against one defendant in a joint trial, with careful instructions to the jury not to consider it in weighing the evidence against another defendant. It may be recognized that this is not ideal, but it is a conclusion which this Court has found justified in the process of adjusting a number of competing considerations.

But the *Delli Paoli* rule is a generalization. In the usual case it works well. Like all such rules, though, it must be evaluated in the light of the facts of the

particular case. Here it has been determined that the confession was wrongly admitted against the first defendant and his conviction has been reversed, leading to a new trial at which he was acquitted. To argue, in this situation, that the other defendant's conviction should nevertheless stand may be to place too great a strain upon the rule—at least, where, as here, the other evidence against the second defendant is not strong.

As indicated in the Statement (*supra*, p. 3), only one witness, Miss Miller, identified the petitioner at the trial, and her identification testimony was weakened by long delay and by her failure to identify him at an earlier lineup. Inasmuch as Evans—although identified at this trial with more certainty than petitioner—was acquitted at the second trial when his statements were not introduced in evidence, we find it difficult to say with assurance that the jury in this case could not have been influenced by Evans' admissions in resolving the identification issue despite the efforts of the trial judge in his instructions to insulate petitioner from them. In the light of the relatively weak identification evidence as to the petitioner, we think precautions should have been taken to protect petitioner from the possibility of prejudice by keeping his name out of the recital of the confession. The first admission of guilt by Evans did not mention the petitioner (App. 79). When the government decided to rely not only on that first statement, but on the more detailed later statement, it should, in the circumstances of this case, have taken more care than it did to make certain

that the petitioner was not mentioned. The government, which knew that Evans had mentioned the petitioner in the second confession, could have alerted the inspector who testified as to Evans' statements to avoid all reference to the petitioner, either by name or implication.

We submit these views for the Court's consideration. It is our position that, in the light of the record in this particular case and in the interests of justice, the judgment below should be reversed and the cause remanded for a new trial. Cf. *Calvaresi* v. *United States,* 348 U.S. 961.

Respectfully submitted.

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